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c 238 Mercantile Law Amendment Act

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CHAPTER 238

The Mercantile Law Amendment Act

1. In this Act,

Interpre-
tation

- (a) "bill of lading" includes all receipts for goods accompanied by an undertaking to transfer them from the place where they were received to some other place by any mode of carriage whatever, whether by land or water or partly by land and partly by water;
- (b) "goods" includes wares and merchandise;
- (c) "warehouse receipt" means a receipt given by any person for any goods in his actual, visible and continued possession as bailee thereof in good faith and not as of his own property, and includes,
 - (i) a receipt given by any person who is the owner or keeper of a harbour, cove, pond, wharf, yard, warehouse, shed, storehouse or other place for the storage of goods delivered to him as bailee, and actually in the place or in one or more of the places owned or kept by him whether such person is engaged in other business or not,
 - (ii) a receipt given by any person in charge of logs or timber in transit from timber limits or other land to the place of destination of such logs or timber,
 - (iii) a specification of timber,
 - (iv) a warehouse receipt as defined by *The Warehouse Receipts Act*. R.S.O. 1950, c. 231, s. 1. R.S.O. 1960, c. 424

2.—(1) Every person who, being surety for the debt or duty of another or being liable with another for any debt or duty, pays the debt or performs the duty is entitled to have assigned to him, or to a trustee for him, every judgment, specialty or other security that is held by the creditor in respect of the debt or duty, whether the judgment, specialty or other security is or is not deemed at law to have been satisfied by the payment of the debt or the performance of the duty.

Right of
sureties
paying the
principal
debt, etc.,
to assign-
ment

Remedies on
such assign-
ment

(2) Such person is entitled to stand in the place of the creditor, and to use all the remedies and, on proper indemnity, to use the name of the creditor in any action or other proceeding in order to obtain from the principal debtor, or any co-surety, co-contractor or co-debtor, indemnification for the advances made and loss sustained by such person, and the payment or performance made by him is not a defence to such action or other proceeding by him.

What one
co-surety,
etc., may
recover from
another

(3) No co-surety, co-contractor or co-debtor is entitled to recover from any other co-surety, co-contractor or co-debtor more than the just proportion to which, as between themselves, the last-mentioned person is justly liable. R.S.O. 1950, c. 231, s. 2.

Securities
held on joint
account

3.—(1) Where, in a mortgage or an obligation for payment of money, or a transfer of mortgage or of such obligation, made after the 1st day of July, 1886, the sum or any part of the sum advanced or owing is expressed to be advanced by or owing to more persons than one out of money, or as money, belonging to them on a joint account, or where a mortgage, or such an obligation, or such a transfer, is made to more persons than one, jointly and not in shares, the mortgage money, or other money or money's worth, for the time being due to such persons on the mortgage or obligation shall be deemed to be and remain money or money's worth belonging to those persons on a joint account, as between them and the mortgagor or obligor, and the receipt in writing of the survivors or last survivor of them, or of the personal representative of the last survivor, is a complete discharge for all money or money's worth for the time being due, notwithstanding any notice to the payer of a severance of the joint account.

Application
of section

(2) This section applies only if and as far as a contrary intention is not expressed in the mortgage or obligation or transfer, and has effect subject to the terms thereof. R.S.O. 1950, c. 231, s. 3.

Joint
contracts

4. In case any one or more joint contractors, obligors or partners die, the person interested in the contract, obligation or promise entered into by such joint contractors, obligors or partners may proceed by action against the representatives of the deceased contractor, obligor or partner in the same manner as if the contract, obligation or promise had been joint and several, and this notwithstanding there may be another person liable under such contract, obligation or promise still living, and an action pending against such person, but the property and effects of shareholders in chartered banks or the members of other incorporated companies are

not liable to a greater extent than they would have been if this section had not been passed. R.S.O. 1950, c. 231, s. 4.

5.—(1) A covenant, and a contract under seal, and a bond or obligation under seal, made with two or more jointly to pay money or to make a conveyance, or to do any other act to them or for their benefit, shall be deemed to include and shall by virtue of this Act imply an obligation to do the act to or for the benefit of the survivor or survivors of them, and to or for the benefit of any other person to whom the right to sue on the covenant contract, bond or obligation devolves.

Effect of covenant with two or more jointly

(2) This section extends to a covenant implied by *The Conveyancing and Law of Property Act*.

Idem
R.S.O. 1960,
c. 66

(3) This section applies only if and as far as a contrary intention is not expressed in the covenant, contract, bond or obligation, and has effect subject to the covenant, contract, bond or obligation and to the provisions therein contained. R.S.O. 1950, c. 231, s. 5.

Contrary intention

6.—(1) Any covenant, whether express or implied, or agreement entered into by a person with himself and one or more other persons shall be construed and be capable of being enforced in like manner as if the covenant or agreement had been entered into with the other person or persons alone.

Covenants of a person and one or more persons enforceable

(2) This section applies to covenants or agreements heretofore or hereafter entered into and to covenants implied by statute in the case of a person who conveys or is expressed to convey to himself and one or more other persons, but without prejudice to any order of the court made before the 18th day of April, 1933. R.S.O. 1950, c. 231, s. 6 amended.

Application of section

7.—(1) Every consignee of goods named in a bill of lading and every endorsee of a bill of lading to whom the property in the goods therein mentioned passes upon, or by reason of the consignment or endorsement, has and is vested with all rights of action, and is subject to the same liabilities in respect of the goods as if the contract contained in the bill of lading had been made with him.

Bills of lading

(2) Nothing in this section prejudices or affects any right of stoppage *in transitu*, or any right to claim freight against the original shipper or owner, or any liability of the consignee or endorsee, by reason or in consequence of his being the consignee or endorsee, or of his receipt of the goods by reason of or in consequence of the consignment or endorsement.

Certain rights and liabilities not affected

Bills of lading as evidence against signer

(3) Every bill of lading in the hands of a consignee or endorsee for valuable consideration representing goods to have been shipped on board a vessel, train or conveyance of any kind is conclusive evidence of shipment as against the master or other person signing it, notwithstanding that the goods or some part thereof may not have been so shipped, unless the holder of the bill of lading has actual notice at the time of receiving it that the goods had not in fact been laden on board, or unless the bill of lading has a stipulation to the contrary, but the master or other person so signing may exonerate himself in respect to such misrepresentation by showing that it was caused without any default on his part, and wholly by the fraud of the shipper or of the holder, or of some person under whom the holder claims. R.S.O. 1950, c. 231, s. 7.

Assignment of warehouse receipts, etc., as collateral security
R.S.O. 1960, c. 424

8.—(1) Subject to the provisions of *The Warehouse Receipts Act* as to the negotiation of, and the transfer of the goods covered by, a warehouse receipt as defined therein, the owner of or other person entitled to receive the goods included in a warehouse receipt or bill of lading may transfer the warehouse receipt or bill of lading by endorsement thereon signed by himself, his attorney or agent to any other person as collateral security for any debt owing by him.

What passes

(2) The endorsement or transfer vests in the transferee from the date thereof all the right or title of the transferor to or in the goods, subject to the right of the transferor to have the goods, warehouse receipt or bill of lading re-transferred to him if the debt is paid when due.

Rights of transferee

(3) If the debt is not paid when due, the person to whom the goods, warehouse receipt or bill of lading was so transferred may sell the goods and, after satisfying any lien against the goods, may retain the proceeds or so much thereof as is equal to the amount of the debt and shall return the overplus, if any, to the transferor. R.S.O. 1950, c. 231, s. 8.

Warehouse receipt or bill of lading given by owner who is warehouseman

9. Where a person by whom a warehouse receipt or bill of lading might be given for goods in his capacity as a miller, or the owner or keeper of a harbour, cove, pond, wharf, yard, warehouse, shed, storehouse or other place for the storage of goods delivered to him as bailee, master of a vessel or carrier, is the owner of or entitled himself otherwise than in such capacity to receive the goods, any warehouse receipt or bill of lading, or any acknowledgment or certificate intended to answer the purpose thereof, given and endorsed by such person is as valid and effectual for the purposes of this Act as if the warehouse receipt, bill of lading, acknowledgment

or certificate had been given by one person and endorsed by another. R.S.O. 1950, c. 231, s. 9.

10. If goods are manufactured or produced from the goods or any of them included in or covered by any warehouse receipt, while so covered, the person holding the warehouse receipt shall hold or continue to hold the goods during the process and after the completion of the manufacture or production with the same right and title and for the same purposes and upon the same conditions as he held or could have held the original goods. R.S.O. 1950, c. 231, s. 10.

As to goods manufactured from articles pledged

11.—(1) No goods, other than timber, boards, deals, staves, sawlogs or other lumber, shall be held in pledge for any period exceeding six months.

Limit of time for holding goods in pledge

(2) No timber, boards, deals, staves, sawlogs or other lumber shall be held in pledge for any period exceeding twelve months.

Idem

(3) No transfer of a bill of lading or warehouse receipt shall be made under this Act to secure the payment of any debt unless the debt is contracted at the time of the acquisition of the bill of lading or warehouse receipt, or upon the written promise or agreement that the bill of lading or warehouse receipt would be given to such person. R.S.O. 1950, c. 231, s. 11.

When the debt may be incurred

12. All advances made on the security of a bill of lading or warehouse receipt give to the person making the advances a claim for the re-payment of the advances on the goods therein mentioned, or into which they have been converted, prior to and by preference over the claim of any unpaid vendor or other creditor, save and except claims for wages for labour performed in making and transporting timber, boards, deals, staves, sawlogs or other lumber, but such preference is not given over the claim of an unpaid vendor who had a lien upon the goods at the time of the acquisition by such person of the bill of lading or warehouse receipt, unless the same was acquired by him without knowledge of such lien. R.S.O. 1950, c. 231, s. 12.

Prior claim of person making advance over unpaid vendor

13.—(1) In the event of the non-payment at maturity of any debt or liability secured by a bill of lading or warehouse receipt, the holder thereof may sell the goods mentioned therein or so much thereof as will suffice to pay the debt or liability with interest and expenses, returning the surplus, if any, to the person from whom the bill of lading or warehouse receipt, or the goods mentioned therein, as the case

Sale of goods on non-payment of debt

may be, were acquired, but such power of sale shall be exercised subject to subsections 2, 3 and 4.

Notice of
sale of
timber, etc.

(2) No sale of any timber, boards, deals, staves, sawlogs or other lumber shall be made under this Act without the consent in writing of the owner until notice of the time and place of the sale has been given by registered letter to the last known address of the pledgor at least thirty days before the sale.

Notice of
sale of
other goods

(3) No goods, other than timber, boards, deals, staves, sawlogs or other lumber, shall be sold under this section without the consent of the owner until notice of the time and place of sale has been given by a registered letter to the last known address of the pledgor thereof at least ten days before the sale.

Sale by
auction

(4) Every sale under such power of sale without the consent of the owner shall be made by public auction after notice thereof by advertisement in at least two newspapers published in or nearest to the place where the sale is to be made, stating the time and place thereof. R.S.O. 1950, c. 231, s. 13.

Transfer of
warehouse
receipts for
crude petro-
leum issued
by incorpo-
rated
companies

14.—(1) Every transportation receipt, warehouse receipt, accepted order and certificate for crude petroleum, issued by an incorporated company authorized to carry on the business of warehousing, is transferable by endorsement, either special or in blank, and upon being endorsed in blank becomes transferable by delivery, and every such endorsement or transfer by delivery transfers all right of property and possession of the petroleum mentioned in the transportation or warehouse receipt, accepted order or certificate, to the endorsee or transferee thereof, subject to the terms and conditions of the transportation or warehouse receipt, accepted order or certificate as fully and completely as if a sale of the petroleum mentioned therein had been made in the ordinary way.

Idem

(2) On the delivery of any petroleum mentioned in such document by such company in good faith to a person in possession of the transportation or warehouse receipt, accepted order or certificate so endorsed or transferred, the company is freed from all further liability in respect thereof, and the endorsee or transferee or holder of the transportation or warehouse receipt, accepted order or certificate to whom the property in the petroleum mentioned therein passes by reason of such endorsement or delivery has transferred to and vested in him all rights of action and is subject to the same liabilities in respect of such petroleum as if the contract contained in the transportation or warehouse receipt, accepted order or certificate had been made by the company with himself. R.S.O. 1950, c. 231, s. 14.

15. Stipulations in contracts as to time or otherwise that would not, before the coming into force of *The Ontario Judicature Act, 1881*, have been deemed to be or to have become of the essence of such contracts in a court of equity shall receive in all courts the same construction and effect as they would prior to the coming into force of that Act have received in equity. R.S.O. 1950, c. 231, s. 15.

Construction
of stipu-
lations not
of the
essence of
the contract
1881, c. 5

16. Part performance of an obligation either before or after a breach thereof when expressly accepted by the creditor in satisfaction or rendered in pursuance of an agreement for that purpose, though without any new consideration, shall be held to extinguish the obligation. R.S.O. 1950, c. 231, s. 16.

Part per-
formance

